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Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

LAWRENCE K. SILVA, Ph. D.,

Petitioner

v.

BOWIE STATE UNIVERSITY, Part of the University System of Maryland,

Respondent

On Amended Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

AMENDED PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Petitioner timely filed a claim with the Maryland Commission for Human Relations alleging discrimination and retaliation for prior EEO activity following his termination from Bowie State University. Petitioner initially filed his claim in the Circuit Court for Prince George's County, Maryland. Bowie State University removed the action to the United States District Court for the district of Maryland. On or about May 16, 2005, Petitioner filed a Second Amended Complaint. Soon thereafter, Bowie State University filed its Motion to Dismiss. A hearing on Respondent's Motion to Dismiss was held on June 21, 2005, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion to Dismiss, accepting Respondent's argument that (1) requiring Petitioner to undergo an independent medical examination (IME) did not constitute an adverse employment action and (2) Petitioner's termination was not causally connected to his EEO claim but to his refusal to undergo the IME.

Petitioner timely filed his notice of appeal with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed in part, vacated in part, and remanded the matter for further proceedings. Specifically, the Fourth Circuit found that the District Court had erred in granting the University's motion to dismiss Petitioner's retaliatory discharge claim, stating that the 10-week lapse of time sufficiently established a prima facie case of retaliation. The Court then remanded for further proceedings as to whether a causal connection existed between the termination and Petitioner's prior EEO activity.

On remand, the parties did not reopen discovery. Respondent filed a Motion for Summary Judgment. A hearing on Respondent's Motion for Summary Judgment was held on January 22, 2007, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion for Summary Judgment, accepting Respondent's argument that the adverse employment action – the termination – was not causally connected to this EEO claim but to Petitioner's refusal to undergo the IME.

Petitioner again timely appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, based on the informal briefs filed by the parties, affirmed the District Court decision in an unpublished opinion issued on August 2, 2007. Petitioner timely filed a petition for rehearing and rehearing en banc on or about August 15, 2007. The Fourth Circuit issued its decision denying the petition for rehearing and rehearing en banc on September 21, 2007. Jurisdiction of U.S. District Court for the District of Maryland was invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1443.

The questions presented for review are:

1. Whether the District Court erred in finding that the request for the IME was justified based on the content of Petitioner's EEO complaint; and

2. Whether the District Court erred in finding that there was no indication that Petitioner's prior EEO complaints were of a similar nature, giving rise to an inference that the reason for termination was mere pretext for retaliation.

II. LIST OF PARTIES TO THE PROCEEDING

The following parties appeared before the courts below: Lawrence K. Silva, Ph.D., Bowie State University, part of the University System of Maryland. There are no intervenors or *amici* in this Court.

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OTHER AUTHORITY

None

V. PETITION FOR A WRIT OF CERTIORARI

Petitioner Lawrence K. Silva, Ph. D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

VI. OPINIONS BELOW AND JURISDICTION

The opinions of the Fourth Circuit (Petitioner's Appendix 3a, 8a) are unpublished. The Court of Appeals issued its opinion on Appellant's petition for rehearing and rehearing en banc on September 21, 2007. (Pet. App. 6a). The district court opinions were made on the record; there is no written memorandum. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

VII. RELEVANT STATUTORY PROVISION(S)

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a), provides in relevant part:

> *It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*

VIII. STATEMENT

1. Petitioner is a U.S. citizen of African descent (Nigeria). His ethnic background is Yoruba (a tribe in the Western part of Nigeria). His religious affiliation is Southern Baptist. Petitioner is 57 years of age. In 2001, Petitioner filed an EEO claim against Bowie State University alleging discrimination based on national origin, religion, and age. On or about August 12, 2002, Petitioner returned to Bowie State University as part of a settlement agreement arising from this prior EEO complaint. The parties executed a settlement agreement and written employment contract. The agreements provided, among other things, that Appellant would not be required to submit to an independent medical examination. (Settlement Agreement dated April 23, 2002 (Petitioner's App. 18a); Letter from Miller & Obayashi, dated April 15, 2002 (Pet. App. 24a)). Petitioner returned to work and complied fully with the terms of agreements, fulfilling his obligations as a tenured associate professor.

2. When Petitioner was again subjected to harassment and a hostile environment, he filed a second EEO complaint with the University's EEO office. Upon reviewing Petitioner's EEO claim, Respondent demanded that Petitioner submit to an IME. The imposition of this requirement expressly contravened the terms of the settlement agreement with the University on the prior EEO claim. Therefore, Petitioner refused to submit to the IME. Respondent terminated Petitioner on April 8, 2003.

3. Petitioner timely filed the instant claim with the Maryland Commission for Human Relations. Upon receipt of his Notice of Right to Suit, Petitioner filed an

action in the Circuit Court for Prince George's County, Maryland. Respondent removed the action to the United States District Court for the District of Maryland. On or about May 16, 2005, Petitioner filed his Second Amended Complaint. Soon thereafter, Respondent filed a Motion to Dismiss. A hearing on Repondent's Motion to Dismiss was held on June 21, 2005, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion to Dismiss, accepting Respondent's argument that (1) requiring Petitioner to undergo an IME did not constitute an adverse employment action and (2) Petitioner's termination was not causally connected to his EEO claim but to his refusal to undergo the IME.

4. Petitioner timely filed his notice of appeal, which was docketed before the United States Court of Appeals for the Fourth Circuit as 05-1760. The Fourth Circuit affirmed in part, vacated in part, and remanded the matter for further proceedings. Specifically, the Fourth Circuit found that the District Court had erred in granting the University's motion to dismiss Petitioner's retaliatory discharge claim, stating that the 10-week lapse of time sufficiently established a *prima facie* case of retaliation. The Court then remanded for further proceedings as to whether a causal connection existed between the termination and Petitioner's prior EEO activity. (Pet. App. 8a).

5. On remand, the parties did not reopen discovery. Respondent filed a Motion for Summary Judgment. A hearing on Respondent's Motion for Summary Judgment was held on January 22, 2007, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion for Summary Judgment, accepting Respondent's argument that the adverse

employment action – the termination – was not causally connected to his EEO claim but to his refusal to undergo the IME.

6. Before the Fourth Circuit, Petitioner argued that the District Court erred in finding no relationship between Petitioner's filing of an EEO complaint and the termination decision. Specifically, the District Court erred in finding that the request for the IME was justified based on the content of Petitioner's EEO complaint. It is well-settled that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. *See Childress v. City of Richmond*, 120 F.2d 476 (4th Cir. 1997). Petitioner has an absolute right to participate in the EEO process and file a claim where he believes he has been wronged; no matter what the merits of the claim may be determined, there can be no retaliation for filing it. Courts have consistently held that an employer is liable for retaliating against an individual for filing an EEO charge regardless of the validity or reasonableness of the charge. *See Id.; Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

7. There was sufficient evidence in the record that Respondent understood there would be no further IME demands. This was not a vague allegation by Petitioner. The demand for the IME was a material breach of the settlement agreement reached in Petitioner's prior EEO activity. Therefore, the IME demand constituted an adverse employment action, which had the effect of deterring one from complaining about discrimination or continued harassment. *See Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2415-16 (2006)(retaliatory action exists when, in the given context, it well might dissuade a reasonable worker from

making a charge of discrimination). The elimination of the IME as a condition of reemployment was clear. (See letter from Miller & Obayashi Mediation, LLC (Pet. App. 24a). The deposition testimony submitted by Respondent in support of its motion also corroborated Petitioner's belief that the IME would only be used to justify another termination, as it had been used before. Therefore, there was sufficient evidence, if viewed in the light most favorable to the non-moving party, to rebut the University's purported nondiscriminatory reason for the termination. The evidence was sufficient to show a dispute as to a material fact which should have been left for the jury to decide. *Burlington Northern & Santa Fe Railway Co.*, 126 S. Ct. at 2417.

8. The District Court also erred in finding that there was no indication that Petitioner's prior EEO complaints were of a similar nature. While a claim for retaliation does not require a reviewing court to consider the nature of the claim that led to the filing of the charge, *see Burlington Northern*, 126 S. Ct. at 2416), the record did contain sufficient evidence of the similar nature of Petitioner's complaints, including affidavit and deposition testimony. The evidence was sufficient to show a dispute as to a material fact, giving rise to an inference that the Respondent's reason for termination was mere pretext for retaliation.

9. This petition for a writ of certiorari followed.

IX. REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the Court of Appeals for the Fourth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and another United States court of appeals. Specifically, the Court of Appeals for the Fourth Circuit affirmed the decision of the lower court finding that the nature of Petitioner's EEO claim justified the action leading to his termination. The lower court stated that Petitioner's claim was "delusional" and therefore not protected by the retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended. It is well-settled, however, that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. This Court in *Burlington Northern & Santa Fe Railway Co. v. White* held that "nature of the discrimination that led to the filing of the charge" need not be considered by the reviewing court or jury. 126 S. Ct. at 2416. Further, this standard has been adopted by every circuit that has considered the issue, but has not been applied uniformly. Petitioner, and others similarly situated, have an absolute right to participate in the EEO process and file a claim where he believes he has been wronged. No matter what the merits of the claim may be determined, there can be no retaliation for filing it. *See Childress v. City of Richmond*, 120 F.2d 476 (4th C ir. 1997); *Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994). There was sufficient evidence in the record that the demand for an independent medical examination violated the settlement in Petitioner's prior EEO claim and therefore constituted an adverse employment action giving rise to an inference of retaliation. The ques-

tion of retaliation, therefore, was one for the jury to decide rather than the court in granting Respondent's motion for summary judgment.

Respectfully submitted,
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Date: April 3, 2008